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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75- 75-5444

EHRLICH ANTHONY COKER,

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on May 20, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at _____ Ga. _____, 216 S.E.2d 782 (1975) and is set out in Appendix A hereto, pp. 1a-16a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on May 20, 1975. A timely motion for rehearing was denied on June 17, 1975; a motion for leave to file a second motion for rehearing was denied on July 10, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of rape under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws, 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States, and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

3. Whether the procedures followed to ascertain petitioner's competence to stand trial on a capital charge were adequate to protect petitioner's right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the psychiatrist appointed to examine petitioner was unable to make a diagnosis as to petitioner's competence, and recommended further and more extensive testing, and when the State introduced no expert testimony concerning petitioner's competence?

4. Whether petitioner's rights under the Confrontation Clause of the Sixth Amendment to the Constitution of the United States were violated by his exclusion from an evidentiary hearing at which testimony was taken and evidence introduced concerning the question whether veniremen with conscientious scruples against the death penalty had been excluded for cause earlier in his trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the CODE OF GEORGIA
Code of Georgia:

Ga. Code Ann. § 26-2001 (1972)

> "Rape.--A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one or more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. §26-1312 (1972)

> "Kidnapping.--(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
>
> . . . .
>
> A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1813 (1972)

> "Motor vehicle theft.--(a) First offense.--(1) Motor vehicles.--The theft of any motor vehicle as defined by an Act regulating traffic upon the highways, approved January 11, 1954 (Ga. Laws 1953, Nov.-Dec. Sess., p. 566) [Chapters 68-15 through 68-17], shall be a felony. Any person convicted thereof shall, the first offense, be punished by imprisonment in the penitentiary for not less than three years nor more than seven years: Provided that the jury may recommend that same be punished as for a misdemeanor."

Ga. Code Ann. §26-1902 (1972)

> "Armed robbery.--A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2501 (1972)

> "Escape.--A person commits escape when he: (a) having been convicted of a felony or misdemeanor, or of the

violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement; or (b) being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement. A person who, having been convicted of a felony or misdemeanor, is convicted of escape shall be punished by imprisonment for not less than one nor more than five years. Any other person convicted of escape shall be punished as for a misdemeanor except that a person who commits escape while armed with a dangerous weapon shall, upon conviction, be punished by imprisonment for not less than one nor more than 10 years."

Ga. Code Ann. §26-3102 (1974 supp.)

"Capital offenses; jury verdict and sentence.--Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstances shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1974 supp.)

"Recommendation to mercy.--In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Said recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2503 (1974 supp.)

"Presentence hearings in felony cases.--(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.
(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Ga. Code Ann. §27-2514 (1974 supp.)

"Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.--Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1 (1974 supp.)

"Mitigating and aggravating circumstances; death penalty.--(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record

of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary of arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation.

The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1974 supp.)

"Review of death sentences.--(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws 1973, No. 74, p. 162

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict

or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty of pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury of judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on May 20, 1975, affirming petitioner's death sentence. Petitioner, Ehrlich Anthony Coker, a white man, was sentenced to death on November 22, 1974, for the rape of Mrs. Elnita Carver, a white woman. 1/

On September 2, 1974, petitioner was serving sentences for murder, rape, kidnapping, and aggravated assault at the Ware Correctional Institution near Waycross, Georgia. 2/ At 8:10 p.m., during an Alcoholics Anonymous meeting in the prison chapel attended by petitioner and thirty-two other inmates and supervised by two guards, an inmate named Brink suddenly brandished a two foot long wrench and declared, "Don't move. This is an escape. I don't

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1/ At his trial for rape, petitioner was also convicted of armed robbery, kidnapping, motor vehicle theft, and escape, and sentenced to, respectively, terms of life imprisonment, twenty years imprisonment, seven years imprisonment, and five years imprisonment, to be served consecutively. The Supreme Court of Georgia affirmed these convictions and sentences. Coker v. State, __Ga. __, 216 S.E.2d 782 (1975); App. A, infra.

2/ On March 12, 1973, petitioner was convicted in the Richmond County Superior Court of the kidnapping and rape of one Susan Lorrine Jones and received sentences of, respectively, life imprisonment and twenty years imprisonment. On May 28, 1973, in the Taliaferro County Superior Court, petitioner pleaded guilty to the rape of and aggravated assault upon Miss Jones, and received sentences of, respectively, life imprisonment and eight years imprisonment. On April 6, 1973, in the Clayton County Superior Court, petitioner pleaded guilty to the rape and murder of one Sue Ann Wick and received sentences of, respectively, twenty years imprisonment and life imprisonment.

want to hurt anybody." T. 5.[3] The guards were allowed to gather together the inmates who were not assisting Brink, and a group of nine prisoners, including petitioner, refused to join the guards. T. 7. Petitioner and three others began tearing out the plywood ceiling in a hallway leading to the chapel and climbed into an attic which opened onto the roof of the building; the chapel was part of the main prison building and was partially surrounded by a cyclone fence which delimited the prison grounds. A few minutes later, guards took charge of the other inmates in the chapel without any violence and returned them to their respective cells. A head count revealed that petitioner and two other prisoners were not present in their cells. T. 34.

Later that evening, at approximately 11:00 p.m., Mr. Allen Carver and his wife, Elnita, who had given birth to a son three weeks earlier, were in the kitchen of their Waycross home when petitioner suddenly entered the room through the unlocked kitchen door. Petitioner, who was five feet, seven inches tall and who weighed 140 pounds, T. 183, was wearing prison clothes and was holding a "board", T. 48, over his head. He said,"'Don't anybody try anything and nobody will get hurt,'" T. 97, and ordered the Carvers to go into the bedroom where he had Mrs. Carver tie her husband's hands and feet together with one of her blouses. Not satisfied with this job, petitioner then tied Carver to the shower rod in the bathroom. Petitioner changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun, anything to drink. Mrs. Carver gave him some iced tea, and, while in the kitchen, petitioner turned out the lights and put a steak knife with a four inch long blade under his belt. T. 53-54. He also took Carver's billfold, which contained $20.30, and the keys to the family car from a dresser top. He then pushed the baby, who was asleep in his basinette throughout the incident, into the bathroom with Carver, who complained that his hands were growing numb in their bonds. T. 92. Petitioner replied that "it was better than being dead," ibid., but he untied Carver from the shower rod and bound his hands to the bathroom sink and his feet to the toilet and put a pillow under his head, T. 93. According to Carver, petitioner "said for me not to try anything funny, that he didn't want to have to hurt me, and he said he'd hurt me . . . . [i]f I tried anything." T. 52.[4]

3/ The record in this case is composed of a two volume, 251 page trial transcript (hereinafter cited as "T."), a separately paginated one volume, 48 page commitment hearing transcript (hereinafter cited as "C.H.T."), a separately paginated, one volume, 98 page transcript of the hearing on petitioner's special plea of insanity (hereinafter cited as "I.T."),a separately paginated one volume, 73 page sentencing hearing transcript (hereinafter cited as "S.T."), a separately paginated, one volume, 25 page transcript of the hearing on petitioner's motion to correct transcript (hereinafter cited as "C.T.T."), and a separately paginated, one volume, 65 page appellate record in the Georgia Supreme Court (hereinafter cited as "R.").

4/ On cross-examination, Mr. Carver testified:

> "Q [Defense Counsel] Now, I thought I understood you to say that after he had you tied with your hands on the sink and your feet around the commode, is that when he said, 'Don't try anything funny. I don't want to hurt you'?"
> A [Mr. Allen Carver] No.
> Q When did he say that?
> A When he started to messing with my wife and I told him that he said he wasn't going to do it, and he just said, 'Shut your mouth.' He said, 'I don't want to have to hurt you.'
> Q He didn't say he was going to hurt you, did he? He said he didn't want to hurt you? Is that right?
> A Yes."
>
> T. 100

Petitioner then ordered Elnita Carver, who was wearing a night gown, to get dressed so she could show him how to start the family car. She asked whether she could go to the bathroom to change clothes, "and he said no, that he'd saw plenty of naked people before and he told me to go ahead and change the clothes right there." T. 139. Then, according to Mrs. Carver:

> "[w]hen I pulled off my gown he come up there and he started feeling of me -- he come up to the back of me and started feeling of me, and I started crying and I told him to quit, and he kept on saying that he wouldn't hurt me, and that I'd better shut up, and I kept on telling him to quit and not mess with me. I told him not to touch me, or anything, and he gagged Allen so that he couldn't talk. I think it was with a piece of underwear and then tied something around his mouth, and he closed the bath room door so that Allen couldn't see him, and then he kept on feeling of me and I kept crying and telling him to quit, and Allen started trying to say something, and I couldn't understand what he was saying. He was mumbling something. And I kept on telling him to quit and he said, 'I ain't hurting you, am I.' And I was scared and I didn't know what to say, and I just shook my head no, and I didn't say nothing and he said,'I want your husband to know that I ain't hurting you.' He said, 'Tell your husband I ain't hurting you.' And I just said, 'Uh, huh,' like that. I didn't say it loud, and he said, 'He can't hear you saying it like that,' and, so, I said, 'No.' And then he said -- he said, 'Come on out and tell your husband that I ain't hurting you if I ain't,' and, so I said, 'Allen, he ain't hurting me,'"

T. 139-140. Petitioner then disrobed, "held the knife up at" Mrs. Carver, T. 140, placed it on top of the dresser, and proceeded to have sexual intercourse with her.[5] Petitioner did not "hurt . . . [her] in any other way physically aside from" the act of intercourse. T. 159.

After putting his clothes back on and allowing Mrs. Carver to dress, petitioner inquired whether she knew the way to Atlanta. Neither she nor her husband could give petitioner directions, and petitioner announced that he was taking Mrs. Carver with him. According to Mrs. Carver, petitioner declared to her husband:

> "'I'm going to take your wife with me, and if I don't get stopped by a police car or anything before I get to Waresboro,' he said, 'I'll tie her up and put her out at the station in Waresboro at that corner,' .... [H]e pulled the gag off of Allen's mouth when he was talking to him, and Allen said, 'Well, just make sure you don't hurt her,' and he put the gag back on his mouth and he said -- he said, 'Well, I'm taking her with me.' He said, 'If you get loose and call the police,' he said, 'any time I see a police car pull up behind me and motion for me to get over or something like that,' he said, 'your wife is going to be dead.'"

T. 143.[6]

After petitioner drove away with Mrs. Carver sitting beside him, Allen Carver managed to untie himself and call the police. A widespread search for petitioner and Mrs. Carver was undertaken. A few miles outside of Waresboro, an unmarked police car passed the Carver automobile at a high rate of speed,[7] and petitioner

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5/ A vaginal examination of Mrs. Carver, performed at 5:00 a.m., September 3, 1974, disclosed the presence of sperm, but the doctors were unable to determine the particular male who was the source of the sperm. T. 171.

6/ According to Mr. Carver, petitioner gestured at Mrs. Carver with the knife during this speech. T. 58. According to Mrs. Carver, however, the knife was in petitioner's back pocket at this time. T. 144.

7/ The Sheriff of Ware County, who was driving this unmarked patrol car, later testified that he had suddenly come up behind the Carver car at a curve in the road and had elected to pass the car without attempting to stop it or signal to it in order to prevent harm to Mrs. Carver. T. 184-185.

suspected that it was a police car and that a roadblock had been set up ahead. T. 146. He turned off onto a dirt road, but the road soon came to a dead end, and he backed the car around and stopped, informing Mrs. Carver that they would wait there until the road block was lifted. T. 147. Petitioner unbuttoned her blouse but closed it again when she complained of the mosquitoes. Ibid. He also described his plan to get another car for his trip to Atlanta. T. 148. About ten minutes later, however, a police car turned down the dirt road and stopped in front of the Carver car. According to Mrs. Carver:

> "[h]e said, 'I think that's a policeman right now,' and I didn't say nothing. He said -- he said, 'Well, I reckon they're going to get me now,' and, he said, 'I won't never get away.' And I kept on setting there, and right after that one come up and parked some more cars started coming up and they all parked and all I could see was the lights shining, and then all those men got out and they started coming up there and they told him to get out of the car, and he set there for a minute and then he got up and got out of the car and they took him to the back and searched him and handcuffed him."

Ibid. Petitioner did not attempt to harm Mrs. Carver with the knife, which was behind the car's sun visor, although, according to the Sheriff, he had "ample opportunity", T. 190, to do so.

Petitioner entered a special plea of not guilty by reason of insanity, R. 11, to the charges of rape, kidnapping, armed robbery, motor vehicle theft, and escape, which were filed against him as a result of the events of September 2-3, 1974, and he also

pleaded that he was "now insane and unable to conduct his own defense." R. 27. The issue of petitioner's competence to stand trial was tried separately to a jury before trial of the general issue of petitioner's guilt or innocence, pursuant to Ga. Code Ann. §27-1502 (1972).[8] At this hearing, petitioner testified that he had received a blow to the head with a baseball bat when he was ten or eleven years old and that, as a result, he had blackout spells and memory lapses and frequently heard mysterious voices. I. T. 14-16. He also testified that it was his habit to drink alcohol heavily and frequently and that he customarily passed out as a result of a drinking bout. I.T. 16. Petitioner's defense counsel testified that petitioner was unable to assist effectively in his defense since he was unable to relate key facts, frequently altered his story of what happened, and seemed utterly unconcerned about the possible capital consequences of some of the charges he faced. I. T. 30, 32-33. Dr. Clarence

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8/ Under Georgia practice, a special plea of insanity under Ga. Code Ann. §27-1502 (1972) raises only the question whether a defendant is sane at the time of trial. If a defendant claims he was insane at the time the offense was committed, the defense must be determined when the jury renders its general verdict. See Cochran v. State, 212 Ga. 245, 91 S.E.2d 601, 603 (1956).

M. Johnson, a psychiatrist appointed pursuant to petitioner's motion,[9] interviewed petitioner for fifty minutes and examined his past psychiatric record, but he concluded that further psychological testing and an electroencephalograph monitoring would be necessary to reach a definite diagnosis, I.T. 45. In Dr. Johnson's opinion, petitioner exhibited symptoms of a temporal lobe seizure disorder due to the childhood blow on the head which, when aggravated by alcohol, might account for petitioner's aggressive behavior and which might prevent him from fully cooperating with defense counsel. I.T. 48-49. In his report, Dr. Johnson concluded that "'it appears we are dealing with an underlying psychiatric disorder,'" I.T. 50; he emphasized, however, that in the absence of further examination and analysis, he could not even express an opinion as to whether petitioner "knows right from wrong", I.T. 57, and could cooperate in his defense. The State presented the testimony of the sheriff, two deputy sheriffs, and the warden and a medical technician at the Ware Correctional Institution, all of whom had observed petitioner in custody, I.T. 65-88; these witnesses stated that petitioner appeared to them to be mentally competent and capable of understanding the proceedings against him. The trial court instructed the jury that it was

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9/ The trial court had directed this examination "for the purpose of determining whether the said defendant was criminally responsible, i.e., whether he knew right from wrong, on the 2nd day of September, 1974, and for the further purpose of determining whether the said defendant is mentally fit to stand trial for the above charges at the November, 1974 term of Ware Superior Court." R. 21.

petitioner's burden to satisfy them by a preponderance of the evidence that he was presently incapable of understanding the nature and object of the proceedings against him.[10] I.T. 91-92. The jury returned a verdict stating, "We the Jury find the defendant, Ehrlich Anthony Coker, competent." R. 28.

At petitioner's trial, which began on the day after the hearing on the special plea, Dr. Johnson was the only defense witness, and he again testified that his interview and evaluation of petitioner was "inconclusive" and that "further testing was indicated." T. 215. He stated that he simply could not determine whether petitioner "was able to judge between right and wrong", and could not rule out the possibility of brain damage, T. 227, T. 220, on the basis of his examination. He added that the temporal lobe seizure

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10/ The trial court defined in the following fashion the question to be considered by the jury:

> "Now, members of the jury, I charge you that the question raised by the defendant's special plea of insanity in this trial is not whether the defendant can distinguish between right and wrong, but whether or not he is capable at this time and at the time of his trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorney such assistance as a proper defense to this indictment preferred against him demands."

I.T. 93.

disorder that he suspected petitioner was subject to could be "physically demonstrated or precluded" by electroencephalogram or intoxointerview techniques. T. 222.

The trial judge instructed the jury that a defendant was presumed sane but that upon the introduction of "some competent evidence of insanity", T. 239, the State was obligated to prove sanity beyond a reasonable doubt.[11/] The jury was obligated to find petitioner not guilty by reason of insanity if it found either that he was unable to distinguish between right and wrong or that he was subject to a "delusional compulsion" at the time of the crime.[12/]

11/ "I further charge you that this presumption of sanity may be relied on by the State, and in most cases the State need not bear the burden of introducing evidence and of persuasion as to the sanity of the accused in criminal proceedings; but once the affirmative defense of insanity is raised by the defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State, in order to prove the criminal intent of the accused, must present evidence to prove the sanity of the accused beyond a reasonable doubt." T. 239.

12/ "Now, ladies and gentlemen of the jury, I charge you that the test of criminal responsibility in this State is that if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. And there has been but one recognized exception -- delusional compulsion. Our law provides a person shall not be found guilty of a crime when at the time of the act, omission or negligence constituting the crime, such person, because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

Now, in this State no cognizance is taken of what has been termed impulsive or emotional insanity, where a criminal act is done under some overwhelming and irresistible impulse, unless it be that such impulse is the result of a mental disease or mental defect overriding reason and judgment and obliterating the sense of right and wrong so as to fall within the generally accepted right and wrong test, or the exception above referred

[Cont'd]

The jury found petitioner guilty as charged of rape, kidnapping, armed robbery, motor vehicle theft, and escape. T. 248.

A hearing was convened the next day pursuant to Ga. Code Ann. §27-2503(b)(1974 supp.) to determine sentence on the rape and armed robbery charges. The State introduced evidence of petitioner's prior convictions, see note 1, supra. Petitioner introduced no evidence. The trial court instructed the jury

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12/ [Cont'd]

to of delusional compulsion. Nor under our law is any recognition taken of so-called moral insanity, or of an irresponsibility from a lack of ability to control the will from the habit of indulgence; nor does mental abnormality, mere weakmindness, unless amounting to imbecility or idiocy, which, like lunacy or insanity, may be held to deprive the offender of the sense of right and wrong. Now, the defendant being impressed with delusions of hallucinations is not enough. His criminal act must stem from such mental disease, injury or congenital deficiency, or else his accountability for the criminal act is measured by the general test of whether he could at the time of the crime's commission distinguish right from wrong." T. 241-241a.

that it "may consider," S.T. 42, as a statutory aggravating circumstance justifying imposition of the death penalty for armed robbery, whether the offense was committed by a person with a prior record of conviction for a capital felony.[13] The jury was instructed that it could consider as statutory aggravating circumstances justifying imposition of the death penalty for rape, (1) whether the offense was committed by a person with a prior record of conviction for a capital felony, and (2) whether the offense was committed while the offender was committing another capital felony (armed robbery).[14] The trial court emphasized, however, that "of course, you are under no circumstances required to impose the death sentence, regardless of any aggravating circumstances," S.T. 44, since the jury was free to find that "mitigating circumstances"

13/ "Now, as to Count 1, wherein the defendant has been found guilty of Armed Robbery, you may consider the following aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed: 1. The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony." S.T. 42-43.

14/ "Now, as to Count 2, wherein the defendant has been found guilty of Rape, you may consider one or more of the following statutory aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed under Count 2: 1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." S.T. 43.

predominated:

> "mitigating circumstances are those that do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability of punishment [sic]."

S.T. 45.

The jury's punishment verdict on the armed robbery count was "Recommend Mercy For The Defendant." R. 51.[15] The jury's verdict on the rape count was "Death by Electrocution", and it found both of the aggravating circumstances which the trial court had instructed upon. R. 52.[16]

On April 11, 1975, pursuant to the State's Motion to Correct Transcript, a hearing was held in the Coffee County Superior Court to determine whether any veniremen had been excluded on account of religious or conscientious scruples

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15/ The punishment verdict form given to the jury for this count contained three alternatives: "1. Death by Electrocution 2. Recommend Mercy For The Defendant 3. Recommend That The Judge Impose Sentence." R. 51. The jury had drawn a line through the first and last alternatives.

16/ The jury received a punishment verdict form similar to the one described in note 15, supra, and it drew a line through the second and third alternatives. R. 52. The form also stated "If death is recommended and fixed as punishment, complete the following: We further find the following aggravating circumstances:", ibid., and the jury had written in the ensuing blank space: "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony. 2. The offense of Rape was committed while the offender was engaged in the commission of another capital felony, to-wit: The Armed Robbery of Allen Carver as charged in Count I of the indictment." Ibid.

On December 4, 1974, petitioner was sentenced by the trial court to life imprisonment on the armed robbery count, twenty years imprisonment on the kidnapping count, seven years imprisonment on the motor vehicle theft count, and five years imprisonment on the escape count, the sentences to be served consecutively.

against the death penalty (voir dire had not been recorded by the clerk). The trial court overruled defense counsel's objection that petitioner was absent, C.T.T. 5-6, and proceeded to hear a witness and argument. The trial court then made a written finding that "no prospective Juror was excused on the basis of being conscientiously opposed to Capital Punishment."

On May 20, 1975, the Supreme Court of Georgia affirmed petitioner's convictions and sentences, Mr. Justice Gunter dissenting.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. On November 11, 1974, petitioner filed a Motion to Quash the indictment because the statutory provision of the death penalty for rape "is unconstitutional in that it constitutes cruel and unusual punishment per se and as applied to defendant herein, in violation of the Eight [sic] and Fourteenth Amendments to the Constitution of the United States." R. 18. This Motion was denied, R. 53, and petitioner assigned this ruling as error, Enumeration of Error No. 2. A majority of the Georgia Supreme Court rejected this claim:

> "In motion, appellant made a general attack on the constitutionality of the Georgia Death Penalty Statute, Ga. L. 1973, pp. 159, 163 (Code Ann. § 27-2534.1). This statute has been repeatedly upheld by a majority of this court. See Coley v. State, 231 Ga. 829, 933, 204 S.E.2d 612; Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12; Hooks v. State, 233 Ga. 149, 210 S.E.2d 668; Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (decided April 9, 1975). We affirm those rulings here."

Coker v. State, __Ga.__, 216 S.E.2d 782, 788 (1975); App. A, infra, at 7a.

II. Petitioner's Motion to Quash also alleged "the crime of rape and providing for punishment by death is unconstitutionally vague, indefinite, discretionary, and overbroad so as to violate the due process and equal protection clauses of the State of Georgia and United States Constitution." R. 18. This Motion was denied, R. 53, and petitioner assigned this ruling as error, Enumeration of Error No. 2. A majority of the Georgia Supreme Court rejected this claim:

> "Additionally, appellant attacks the . . . , the rape statute, Code Ann. § 26-2001 . . . as being unconstitutionally vague, indefinite, discretionary and overbroad so as to violate due process and equal protection clauses of the Georgia and United States Constitutions.
>
> Neither at trial nor before this court has appellant supported these contentions with persuasive argument or authority."

Coker v. State, ___Ga.__, 216 S.E.2d 782, 788 (1975); App. A, infra, at 7a.

III. Petitioner's Enumeration of Error No. 16 asserted "[t]he judgment of the Court finding the appellant competent to stand trial was decidedly against the weight and strength of the evidence and was contrary to the evidence and law of the case," and his Enumeration of Error No. 47 declared, "[t]he verdict of the jury as to each count failing to acquit the appellant by reason of insanity is erroneous and contrary to the weight of the evidence." In his Opening Brief, petitioner contended, inter alia, that "[i]n view of . . . [the] testimony by Doctor Johnson, the only expert witness called at the trial

of the Special Plea of Insanity, it is clear that further testing should have been ordered by the Court in order to fully determine the competency of the appellant to stand trial." Opening Brief of Appellant, Coker v. State, Ga. Sup. Ct. No. 29758 (unpaginated). A majority of the Georgia Supreme Court rejected this claim:

> "This court will not set aside a verdict (or judgment) finding against a special plea of insanity at the time of trial unless it appears that the evidence demands a finding in favor of the plea."

Coker v. State, __Ga.__, 216 S.E.2d 782, 791 (1975); App. A, infra, at 10a.

IV. On April 9, 1975, the State filed a Motion to Correct Transcript in the Ware County Superior Court to determine "[w]hether or not any prospective jurors were excluded or excused [at petitioner's trial] on the basis of being conscientiously opposed to capital punishment." A hearing was held on April 11, 1975, in the absence of petitioner, and defense counsel objected that "[t]his is a fact finding process in the trial court, and I feel like the defendant has an absolute constitutional right to be present at all times when this is done." C.T.T.5. This objection was overruled, C.T.T.6, and petitioner assigned this ruling as error in a supplementary Enumeration of Errors: "The Court erred in overruling appellant's timely objection to the conduct of the post-conviction trial court proceeding held on April 11, 1975 for the reason that the appellant was not present at said proceeding and he had not waived his presence prior thereto." (No. 2). The Georgia Supreme Court rejected this claim:

> "Due to the nature of the proceeding the appellant's presence was not required at this administrative hearing with counsel."

Coker v. State, __Ga.__, 216 S.E.2d 782, 797 (1975); App. A, infra, at 16a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Georgia, Eberheart v. Georgia, No. 74-5174, filed August 19, 1974, at pp. 19-58 (attached as Appendix B, infra) and of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Noell v. North Carolina, No. 73-6876, filed June 11, 1974, at pp. 19-22 (attached as Appendix C, infra).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROCEDURES FOLLOWED TO ASCERTAIN PETITIONER'S COMPETENCE TO STAND TRIAL ON A CAPITAL CHARGE WERE ADEQUATE TO PROTECT PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN THE PSYCHIATRIST APPOINTED TO EXAMINE PETITIONER WAS UNABLE TO MAKE A DIAGNOSIS AS TO PETITIONER'S COMPETENCE, AND RECOMMENDED FURTHER AND MORE EXTENSIVE TESTING, AND WHEN THE STATE INTRODUCED NO EXPERT TESTIMONY CONCERNING PETITIONER'S COMPETENCE.

In Drope v. Missouri, ____ U.S. ____, 43 L.Ed.2d 103, 112-113 (1975), the Court recognized that "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." "[T]he conviction of an accused person while he is legally incompetent violates due process," Pate v. Robinson, 383 U.S. 375, 378 (1966). See also United States v. Knohl, 379 F. 2d 427, 434 (CA2 1967); Thomas v. Cunningham, 313 F. 2d 934, 938 (CA4 1963). Cf. Bishop v. United States, 350 U.S. 961 (1956). Moreover, "state procedures must be adequate to protect this right," Pate v. Robinson, supra, 383 U.S. at 378. The present case presents an important procedural question left unanswered by Pate and Drope: is a hearing "adequate" to determine competence when the State introduces no expert testimony and when the court-appointed psychiatrist who has interviewed the defendant is unable to give a medical opinion as to the defendant's competence because further examination is necessary?

Petitioner entered a special plea of insanity to the charges against him, pleading that he was "now insane and unable to conduct his own defense," R. 27. Petitioner moved for a psychiatric examination, and the trial court appointed Dr. Clarence M. Johnson "for the purpose of determining whether . . . [petitioner] was criminally responsible, i.e., whether he knew right from wrong, on the 2nd day of September, 1974, and for the further purpose of determining whether the . . . [petitioner] is mentally fit to stand trial . . . at the November, 1974 term of Ware Superior Court." R. 21.

A hearing was held on November 18, 1974, to adjudicate petitioner's special plea of insanity and determine his competence to stand trial. Petitioner testified that when he was ten or eleven years old he was knocked unconscious by a blow on his forehead with a baseball bat. I.T. 14-15. Since then, petitioner suffered frequent blackout spells and "heard voices talking to" him "pretty frequent." I.T. 16. In response to a question as to whether he understood "what's happening here in this court room today", he replied, "I'm not sure . . . . Trying to get me help, yes, sir." I.T. 17. Petitioner also stated that it had been his habit to drink large quantities of alcohol and that he frequently drank until he passed out. R. 16. Petitioner's counsel described his experience with petitioner:

> "I'm not trying to testify as a psychiatrist. I have one here that'll do that. It is my professional opinion, based on my experience with other defendants, that this man is definitely disturbed and in need of considerable help. It is also my opinion, based

> on my talking to him in my investigation of the case, that he is unable to give me substantial facts in the case."

I.T. 31.

Dr. Clarence M. Johnson described at length his "general psychiatric evaluation", I.T. 44, of petitioner. Dr. Johnson interviewed petitioner for fifty minutes and also reviewed his medical record kept by the Georgia correctional authorities in an effort to determine petitioner's present mental competence. Because of petitioner's history, his drinking habits, and the childhood blow on the head, Dr. Johnson "was concerned about the possibility of what we call temporal lobe seizure disorder, which is recorded in some cases of acute, aggressive, destructive behavior in individuals that suffer from this disorder, and, of course, this is why I recommended electroencephalogram as to exclude this as a possibility." I.T. 47-48. The doctor indicated that he could not diagnose brain damage caused by excessive alcohol intake or the blow on the head simply by talking to petitioner. I.T. 47. Dr. Johnson also "felt" that petitioner "had a disturbance in affect or feeling tones," I.T. 49, "to a pathological degree", I.T. 51, that might prevent him from cooperating with counsel and from fully comprehending the seriousness of the charges he was facing. His final conclusion was that "'[i]in view of his inappropriate affect or feeling tones along with explosive

and impu[l]sive behavior that is sometimes combative and his emotional detachment from stressful events that have happened in the past, it appears we are dealing with an underlying psychiatric disorder.'" I.T. 50. Because of the limited medical facilities at the place of the examination, Dr. Johnson was not able to take an electroencephalogram or administer psychological tests. "[A]t this time I don't think I could answer" the question whether petitioner was mentally competent, I.T. 56: "I was unable to determine a diagnosis." I.T. 65.

The State presented the testimony of the sheriff, two deputies, a prison warden, and a prison medical technician who had conversed with petitioner while he was incarcerated. All testified that he appeared to understand what was said to him and that he made appropriate responses.

The jury returned a verdict, <u>see</u> pp.18-19, <u>supra</u>, finding petitioner competent to stand trial, I.T. 95, whereupon petitioner was tried the next day upon his general plea of not guilty by reason of insanity, R. 25.

Dr. Johnson was the only defense witness, and he repeated the testimony he gave at the special plea hearing:

"Q [Defense counsel] Now, Doctor, will you tell the jury, please, what you found as a result of your psychiatric evaluation?

A [Dr. Johnson] The conclusion of the interview and the evaluation was inconclusive.

Q Inconclusive of what?

A That I did not reach or determine a definite diagnosis in this case. I felt there were indications that further testing was indicated.

Q Now, further testing because of what?

A Because of the observations that were made during the examination made it inconclusive.

Q Did you find positive, direct evidence of any mental or psychiatric disorder?

A There were several observations that were made that indicated that this could not be excluded.

Q That it could not be excluded?

A Yes. . . .

Q (BY MR. BENNETT [defense counsel]) Doctor, what were your recommendations for further examination?

MR. HAYES [for the State]: We object to that as being irrelevant.

THE COURT: Overruled.

Q (BY MR. BENNETT) What, specifically,did you recommend by way of further treatment or evaluation?

A It was felt that two diagnostic aids would be helpful. One was the electroencephalogram; the other would be psychological testing.

Q Now, Doctor, did you have access to an electroencephalogram here in Waycross?

A I did not.

Q Did you have access to what you said -- accurate psychological evaluation or testing here in Waycross?

A I did not feel like I did.

Q What you're saying is that it was beyond your power to do this within the time frame of what you had to do with this individual?

A That would be correct."

T. 215-216. Dr. Johnson testified that the symptoms he was able to observe indicated petitioner might be suffering from some form of schizophrenia or other psychosis:

"Q [Defense counsel] Now, Doctor, do you have any reason to suspect any of those conditions in this defendant?

MR. HAYES [for the State]: Your Honor, we object to what he had reason to suspect. It's getting to the point of complete imagination on his part.

THE COURT: Let's get his finding with some degree of certainty.

Q (BY MR. BENNETT [defense counsel]) Did your finding indicate or suggest any possibility of any of those conditions that you just described?

THE COURT: Are you saying that is a possibility?

MR. BENNETT: No, sir. Do your findings indicate the possibility of any of these.

THE COURT: That's what the objection was to, I understood. It's too indefinite -- possibility.

MR. BENNETT: Well, we try to be as definite as we can, but we're trying to show what we can by this witness.

THE COURT: That's what I want you to do -- show the facts.

MR. BENNETT: That's exactly what I am trying to do.

THE COURT: Let him state his findings, and let's go on.

MR. HAYES: We object on the ground that 'possibility' is so speculative as to amount to imagination.

MR. BENNETT: May we be heard on that?

THE COURT: Ask the doctor what his findings are and let's go on."

T. 218. As to the question of "whether or not he [petitioner] was

able to judge between right and wrong",Dr. Johnson made "an in[con]clusive finding. This was why I recommended further evaluation." T. 220. He again stated his view that petitioner might be afflicated with an organic temporal lobe seizure disorder, S. T. 221:

> "Q(BY MR. BENNETT[defense counsel]) Doctor, can the presence of this lobe disorder you're talking about be objectively or physically demonstrated or precluded?
>
> A [Dr. Johnson] Yes, there are certain tests that can be made.
>
> Q What are those tests?
>
> A Well, electroencephalogram can be very diagnostic. Also sometime [sic]in using the electroencephalogram plus what we call an intoxinterview, allowing the individual to become intoxicated and then recording his electrical impulses of the brain, sometimes will show even a more or higher percentage of pathology.
>
> Q Are these the tests that you would recommend for him or have recommended for him?
>
> THE COURT: Let's go on with that. That's not going to decide any issue before the court. Go on with another question.
>
> MR. BENNETT: May we have an answer to that one?
>
> THE COURT: No. What we want to know is what the doctor knows of this person's condition.
>
> Q(BY MR. BENNETT) All right, now, Doctor, can you tell us anything else about his condition?
>
> THE COURT: Not what the doctor might find out if he had additional time, or anything like that. I don't want to dwell on that any further. All we want to know is what the doctor has determined as a result of that examination.
>
> Q (BY MR. BENNETT) Now, Doctor, what, if anything, else can you tell us about the defendant's knowledge of right and wrong?
>
> A Well, I felt that at the conclusion of my examination

> in summing that there were underlying psychiatric conflicts to the extent of which I was unable to determine, and I don't feel that with the examination I did that I can answer that, either positive or negative.
>
> Q Do you have any kind of opinion at all that you can share with the jury?
>
> THE COURT: I understood him to just say he didn't have any opinion at this time.
>
> MR. BENNETT: Well, I'm just asking him if he has any kind of opinion.
>
> THE COURT: Well, I understood him to say he didn't, but I may have understood him wrong.
>
> THE WITNESS: I could not reach a definite opinion."

T. 222-223.

The State presented no evidence of petitioner's mental capacity at the time of the crime.

The trial court instructed the jury that it could find petitioner not guilty by reason of insanity, see pp.20-21, supra, but the jury found petitioner guilty on all five counts.

Georgia statutes clearly provide that a mentally incompetent defendant shall not be tried and that insanity at the time of the commission of a crime is a legal defense. "No lunatic or person afflicted with insanity shall be tried, or put upon trial, for any offense, during the time he is afflicted with such lunacy or insanity." Ga. Code Ann. §27-1504 (1972). "In all criminal trials in any of the courts of this State wherein an accused shall contend that he was insane or mentally incompetent under the law at the time of the act or acts charged against him were committed, the trial judge shall instruct the jury that, in case of acquittal on such contention,the jury shall specify in their

verdict that the accused person was acquitted because of mental irresponsibility or insanity at the time of the commission of the act."[17/] Ga. Code Ann. §27-1503 (1972). "Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury."[18/] Ga. Code Ann. §27-1502(1972). "The test of criminal responsibility in . . . [Georgia] is that 'if a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible'; and there has been but one recognized exception, which is that although 'a man has reason sufficient to distinguish between right and wrong * * * yet [if] in consequence of some delusion the will is overmastered and there is no criminal intent,' he is not responsible, 'provided that the act itself is connected with the peculiar delusion under which the prisoner is labouring." Rozier v. State, 185 Ga. 317, 195 S.E. 172, 174 (1938). The test for mental competence,

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17/ When such a verdict is rendered, it is then the duty of the trial judge to "retain jurisdiction of the person and to order the person to be confined in a State hospital for the mentally ill." Ga. Code Ann. §27-1503 (1972).

18/ The normal procedure in Georgia on a special plea of incompetence to stand trial is to hold a pre-trial hearing on this question. See Ga. Code Ann. §27-1504 (1972); Hardwick v. State, 231 Ga. 181, 200 S.E. 2d 728, 730 (1973). Where a general plea of not guilty by reason of insanity is entered, this question is generally submitted to the jury at the close of trial as an alternative to the verdicts of "guilty" and "not guilty". Carr v. State, 96 Ga. 284, 22 S.E. 570, 571-572 (1895). The jury is instructed, however, that it must decide whether the defendant is not guilty by reason of insanity before it determines whether he is guilty or not guilty. See T. 232.

however, "is not whether the defendant can distinguish between right and wrong, but is, whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against his demands." Brown v. State, 215 Ga. 784, 113 S.E. 2d 618, 620 (1960). "Such a procedure is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent." Drope v. Missouri, supra. 43 L.Ed.2d at 114.

The procedures followed in this case were inadequate, however, to insure the petitioner was mentally competent, under Georgia law, on September 2, 1974 and at the time of his trial. For although petitioner was interviewed by a psychiatrist, the conditions under which the interview took place made the results inconclusive. Further testing was clearly necessary here since the psychiatrist indicated that he suspected brain damage which might make petitioner incapable of distinguishing between "right" and "wrong" and of cooperating with defense counsel. It is the responsibility of the State and of the trial court to insure that a criminal defendant has an adequate opportunity to present the issue of his competence to stand trial.[19/]

19/ The present vitality of this Court's holding in Leland v.

[Cont'd]

As this Court has recognized, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, supra. 383 U.S. at 384. Defense counsel here, however, clearly and consistently raised the issue of petitioner's competence.

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." Drope v. Missouri, supra, 43 L.Ed.2d at 118. The Court should grant review to determine whether a tentative medical judgment that a defendant is mentally incompetent, in the absence of any countervailing expert testimony by the State, obligates the State to make "further inquiry" into the defendant's mental condition before placing him on trial for his life.

19/ [cont'd]

Oregon, 343 U.S. 790, (1952) that a state requirement that a defendant prove his insanity beyond a reasonable doubt, is not relevant to this case, since petitioner's jury was instructed, T. 239 (and see note 11, supra), that a defendant's sanity was presumed but, upon introduction of "some competent evidence of insanity" by the defendant, the State must prove his sanity beyond a reasonable doubt.

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED BY HIS EXCLUSION FROM AN EVIDENTIARY HEARING AT WHICH TESTIMONY WAS TAKEN AND EVIDENCE INTRODUCED CONCERNING THE QUESTION WHETHER VENIREMEN WITH CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY HAD BEEN EXCLUDED FOR CAUSE EARLIER IN HIS TRIAL.

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of the trial," Illinois v. Allen, 397 U.S. 337, 338 (1970). See also Lewis v. United States, 146 U.S. 370, 372-375 (1892). See generally Pointer v. Texas, 380 U.S. 400 (1965). This case presents a question meriting review by this Court concerning the applicability of the Confrontation Clause to post-trial hearings where critical factual findings are made.

The voir dire testimony of veniremen during the selection of petitioner's trial jury was not recorded or transcribed in its entirety. Petitioner's Assignment of Error Number 17 to the Georgia Supreme Court alleged that the trial court erred in allowing the State to "qualif[y] the jury as to the death sentence," and petitioner's opening brief in the Georgia Supreme Court indicated that certain jurors had been excused on account of conscientious scruples against the death penalty.[20/] On February

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20/ "When the District Attorney qualified the jury as to the death sentence all jurors who stated that they could not, under any circumstances, consider imposition of the death penalty were excused. (Trial Tr. 1.) This exclusion from the jury of veniremen of conscientious scruples against the death penalty violated appellant's rights of the due process of equal protection clauses of the United States Constitution and the Georgia Constitution [sic]. In addition the exclusion of death scrupled veniremen on the panel

12, 1975, while petitioner's appeal was pending before the Georgia Supreme Court, that Court decided Owens v. State, __Ga.__, 214 S.E.2d 173, and held that the failure to transcribe the voir dire examination of capital case jurors excluded for cause on account of their conscientious scruples against the death penalty was reversible error.[21] On April 9, 1975, the State filed a

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20/ cont'd.

from which appellant's jury was selected violated appellant's Sixth Amendment Right to a jury which reflects a fair and representative cross-section of the community." Opening Brief of Appellant, Coker v. State, Ga. Sup. Ct. No. 29758 (unpaginated).

21/ "In the present case, although portions of the voir dire examination of the veniremen appear in the transcript, the examination as it relates to Witherspoon did not appear in the transcript as it was originally transmitted to this court. The clerk of the trial court states that the reporter has nothing more on the questioning. The transcript does show that appellant objected to the method of selecting the jury . . . . In Ross v. State, 233 Ga. 361, 211 S.E.2d 356, this court forecast the result reached in this case by requiring the Witherspoon examination to be transcribed and transmitted. Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 . . . . Code Ann. § 6-805(d) provides that 'Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings . . . and all other proceedings which may be called in question on appeal . . . shall be reported . . . ' In light of Witherspoon, supra, Code Ann. § 27-2401 does not diminish this requirement. . . . In the instant case, the amended motion for new trial stated that the trial court excluded potential jurors who stated that they had conscientious objections to the death penalty, and that movant objected to said exclusion but that the court overruled the objection and allowed the jurors to be excluded. The recital of facts contained in the amendment was approved as true and correct. For the reasons given above, a motion made by the State for permission to supplement the trial transcript pursuant to Code Ann. § 6-805(f) has been denied. A posttrial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review function. We hold that failure to record the Witherspoon voir dire in a case in which the sentence of death is imposed, is reversible error. We therefore reverse the judgment in this case insofar as it imposed the death sentence and remand it to the trial court for a new trial on the question of the sentence." Owens v. State, supra, 214 S.E.2d at 175-176.

"Motion to Correct Transcript" in the Ware County Superior Court to determine "[w]hether or not any prospective jurors were excluded or excused [at petitioner's trial] on the basis of being conscientiously opposed to capital punishment."[22]

A hearing on this motion was held two days later in the Coffee County Courthouse, Douglas, Georgia. On this day, April 11, petitioner was incarcerated at the Georgia State Prison, Reidsville, Georgia. At the opening of this hearing, petitioner's counsel objected that the proceeding should not be conducted in petitioner's absence:

> "This is a fact finding process in the trial court, and I feel like the defendant has an absolute constitutional right to be present at all times when this is done. For example, I believe that he's gonna try to put the Clerk on the stand, ask him what his recollection of wat happened was, possibly try to introduce jury lists to show whether or not somebody was excused or not. I've already discussed the matter with the District Attorney. My recollection of what happened is different from his. I've not had time, though, to talk to my client and see what his recollection is. . . .

22/ The Motion sought a judicial determination of three questions:

> 1.
> "Whether or not at the trial of the above case in the Superior Court of Ware County, was Voir Dire of the Jury recorded.
>
> 2.
> Whether or not any prospective jurors were excluded or excused on the basis of being conscientiously opposed to capital punishment, and if so, what was the courts judicial determination relative thereto.
>
> 3.
> Whether or not there were any objections made by Counsel for the Defendant in relation to Voir Dire which were not included in the transcript of the trial."

> I am not in a position to waive the presence of the defendant here today at this motion. I'm just stating that I do not and I cannot waive his presence in Court . . . . Were we in Ware County, I could not waive his presence at this critical matter. And the Court is well aware that we are talking about a capital death case. And I believe that any proceedings undertaken by this court of a fact finding nature in the absence of the defendant would be absolutely erroneous."

C.T.T. 5-6. The State presented no evidence concerning the feasibility of securing petitioner's attendance. Petitioner's counsel's objection was overruled, however, and the State called as a witness the Clerk of the Ware County Superior Court who testified at length and was cross-examined as to what occurred during the voir dire at petitioner's trial. A venire list and three volumes of reporter's transcript were also placed in evidence by the State.On the basis of this testimony and documentary evidence, the trial court made factual findings which were transmitted to the Georgia Supreme Court.[23/]

23/ The trial court found:

> "In the motion to correct the Transcript, the District Attorney has submitted three questions for a Judicial Determination by the Court, and after hearing the evidence presented, argument of counsel and the recollection and knowledge of the Court as to what transpired during the trial of this case, the Court finds as follows. to-wit:
>
> 1.
> That the Court Reporter, W. J. Summerall, did not record the entire Voir Dire of the prospective Jurors, but that he did record all objections which were made during Voir Dire questioning.
>
> 2.
> The Court further finds that after an examination of the Clerk of Ware Superior and the original Jury list from which the Jury was selected, that no prospective Juror was excused on the basis of being conscientiously opposed to Capital Punishment. The Transcript of the trial does show that the District Attorney did ask the question as to whether anyone

The decision of the Georgia Supreme Court that this hearing was simply an "administrative hearing with counsel" at which petitioner was not entitled to be present, Coker v. State, ___Ga.___, 216 S.E.2d 782, 797 (1975); App. A, infra, at 16a, simply does not withstand scrutiny. For this hearing concerned not ministerial details pertaining to the appellate record but rather the making of new factual findings concerning what had transpired at voir dire. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, supra, 146 U.S. at 372. As the Lewis case itself recognizes (since it dealt with the presence of the defendant at jury selection), this right to be present is not confined to the period between the empaneling of the jury and the return of a verdict. Instead, the "trial" at which a defendant is entitled to be physically present includes any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578 (1884). Cf. Rogers v. United States, 43 U.S.L.W. 4763, 4764-4765 (U.S., June 17, 1975); Shields v. United States, 273 U.S. 583, 588 (1927). This right is "scarcely less important to the accused than the right to trial itself," Diaz v. United States, 223 U.S.

23/ cont'd.

> on the panel had any opposition to Capital Punishment, but he did not receive an affirmative answer from a single Juror, and therefore the court did not excuse or disqualify a prospective Juror on the grounds they were opposed to Capital Punishment.
>
> 3.
> The Court further finds that there were no other objections by counsel for the Defendant or the State during the Voir Dire of the Jury which is not included in the record and Transcript of the Trial."

442, 454 (1912), since a defendant's:

> "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers . . . . The necessities of the defense may not be met by the presence of his counsel only."

Hopt v. Utah, supra, 110 U.S. at 578. Since no record existed of the voir dire, petitioner was entitled to be present when testimony and documentary evidence was introduced to establish, for the record, what had happened at that proceeding, just as he was entitled to be present at the voir dire itself. This motion hearing is significantly different from a hearing to prepare an official version of a trial transcript where there are verbatim reporter's notes of the entire trial, see, e.g., Chessman v. Teets, 354 U.S. 156 (1957).[24/]

Although a criminal defendant may waive his right to be present at judicial proceedings by his disruptive behavior in the courtroom, Illinois v. Allen, supra; Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), or by his consent, Diaz v. United States, 223 U.S. 442, 456-457 (1912), there is no question of waiver here, since petitioner's counsel strenuously objected that petitioner should be present at the hearing and since the State entered no evidence that it would be impossible (or even difficult) to produce petitioner. In view of the Georgia Supreme Court's

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24/ Even in Chessman, a pre-Pointer v. Texas case decided under the Due Process Clause, the Court held that a criminal defendant or his counsel must be present at such a hearing: "Petitioner is entitled to have his conviction reviewed upon a record which has been settled in accordance with procedural due process." Chessman v. Teets, supra, 354 U.S. at 164 n.12.

Owens decision, the trial court's findings were of critical importance for a finding that veniremen were excluded on the basis of their expressed scruples against the death penalty would result in the automatic granting of a new trial. Under these circumstances, petitioner had a constitutional right to confront the witness and evidence introduced by the State (which had not, of course, been presented at the original voir dire hearing) and to assist his counsel by providing his own recollection of what actually happened during jury selection. Although it is uncertain whether petitioner's physical presence would have made a difference in the trial judge's findings, such an inquiry is irrelevant to the issue whether petitioner's Sixth Amendment rights were violated here. The question presented here is one of continuing importance. Cf. Tacon v. Arizona, 410 U.S. 351 (1973)(certiorari dismissed as improvidently granted).

Conclusion

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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